IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 387 OF 2004

Ismail Fidaly Potia through his
C.A. Asif Ismail Potia .. Petitioner

vs

Board of Trustees of the Jawaharlal ..Respondents
Nehru Port Trust

..

Mr.M.S.Doctor i/b Rajani Associates for Petitioner
Mr.Y.N.Muchhala with Ms Hansa Advani with Mr.Sagir Ahmed for Orig. Petitioner
Mr.Rajiv Kumar i/b Mr. Milan Bhise & Co
for Respondents ..

CORAM: S.U.KAMDAR, J

DATE : 8th December, 2004

P.C.

1. The present petition is filed for interim

reliefs inter alia for an injunction restraining the respondents i.e. the Board of Jawaharlal Nehru Port Trust from awarding any contract to any third party or creating any third party interest in respect of A 7 to F in sheds. A further interim order is sought restraining the respondents from preventing in any manner obstructing the petitioner and/or representatives, servants and officers or any other person claiming under them from dismantling of the conveyor galleries being GR3, FR7, FR8 and FR9. The aforesaid relief are sought on the background of the facts which are briefly stated as under :

2. The petitioner is carrying on business in the name of M/s I.F.Potia & Brothers. On 12th August, 2002, the respondents-Jawaharlal Nehru Trust floated a global tender for the disposal and sale of the bulk material handling plant acquired by it in the year 1989-90 which consisted of groups of equipments, accessories and spares. The entire job inter alia was divided into 6 groups i.e. Group A to Group F and each of this group was further divided into two lots. Pursuant to the

advertisement of the respondents, the petitioner herein filled in the tender and inspected the site. The scope of the job under Group D - Lot 1 consisted of the Conveyor system along with associated accessories including civil structures, asbestos sheets, dust control system, public address system, fire alarm system, truck loaodingsystem, internal electric system which was inclusive of the Conveyor galleries being GR 3, FR7, FR8 and FR9. The petitioner filled in tender bid and gave earnest money of Rs.1,52,34,800/-. On 7th October, 2002 the respondents informed the petitioner about the amendments to the Tender documents. The tender was opened by the respondents and the petitioner was the highest bidder for Group D Lot-1 and Group E Lots 1 and 2. On 25th February, 2003 the respondents requested for extention of the validity of the offer upto 31st March, 2003. On 26th February, 2003 the petitioner agreed to extend his offer up to 31st March, 2003. On 31st March, 2003 the offer of the petitioner were accepted by the respondents by issuing a letter of acceptance in respect of Group D-Lot 1 and Group E Lots 1 and 2. On 12th April,

2003 the petitioner gave a cheque of Rs.10,00,29,613.25 being total selling price alongwith the sales tax return in respect of the said tender.

3. It is the case of the petitioner that the said contract included removal of conveyor galleries more particularly known as GR3, FR7, FR8 and FR9 passing above sheds/silos. The petitioners contended that the scope of the contract included removal of the said salvage and that the petitioner is entitled to remove the salvage material as part and parcel of the said contract. On 16th May, 2003 according to the petitioner a meeting took place between the petitioner and the respondents and the matter was considered. The respondents assured that the matter will be taken up with the higher ups for the purpose of taking necessary decision in that behalf. On 21st June, 2003 the petitioner addressed a letter to the Chief Manager (Operations) pointing out that item no. 30 at page 39 of the tender documents Voloume II shows that the conveyor galleries being R3, FR7, FR8 and FR9 above the sheds/silos fall within their scope of

their job. The correspondence continued in that behalf. On 7th June, 2004 according to the petitioner a meeting took place between the petitioner and the Chairman of the respondent-board and the matter was discussed and was referred to the legal department for their opinion. However, the dispute did not get resolved by and between the parties. Sometime in August, 2004 the petitioner came to know that the respondents are likely to enter into an agreement with Gateway Terminals India (GTI) which is a joint venture between Maersk India and Container Corporation of India Ltd for setting up theproposed 1000 crore third terminal at Nhava Sheva. On the basis of the said details being available to the petitioner, the petitioner issued an advocate's notice on 27th August, 2004 inter alia raising dispute and invoking arbitration clause as per clause 3.13 of the tender. By the said notice, the petitioner called upon the respondents to appoint an arbitrator within 30 days from the date of notice to adjudicate the issue whether the said conveyor galleries GR3, FR7,FR8 and FR9 passing above the sheds/silos formed part of the contract executed by and between the

petitioner and the respondents herein and whether the petitioner is entitled to carry on the demolition and entitled to the salvage material in consideration of the said contract executed between the parties. In view of the failure on the part of the respondents to appoint an arbitrator as urged in the letter dated 27th August, 2004 the petitioner herein has filed an application under section 11 of the Arbitration and Conciliation Act, 1996 for the purpose of appointment of arbitrator. On 18th October, 2004 the said arbitration application was numbered as 263 of 2004 and the same is pending.

4. In the meantime with a view to preserve the subject matter of the dispute the present petition is filed by the petitioner under section 9 of the Arbitration and Conciliation Act, 1996. The provisions of the Arbitration and Conciliation Act, 1996 empowers the court to pass interim measures including for passing of an interim stay to preserve the subject matter of the arbitration agreement. It is contended by the learned counsel for the petitioner that if the contract which is

executed with GTI is permitted to operate then it will be the said silos and galleries in effect it would amount to frustration of the applicant's arbitration proceeding because the subject matter of the arbitration proceeding will cease to exist and it will be impoossible to determine what was the salvage material of the said portion of galleries and what is its valuation thereof. In such an event, even if the petitioner succeeds ultimately in arbitration proceeding no effective relief can be granted to the petitioner because subject matter of the arbitration proceedings would be no more existing. In the aforesaid circumstances, the petitioner preferred present petition under section 9 for various interim reliefs as set out hereinabove.

5. By a order dated 18th October, 2004 this court directed the parties to maintain status quo and the matter was adjourned to 25th October, 2004. In the meantime, the said GTI took out notice of motion in this arbitration petition being Notice of motion No.3136 of 2004 inter alia seeking that the order dated 18th October, 2004 be vacated and set aside.

On the said notice of motion an order has been passed by this court on 27th October, 2004. By the said order dated 27th October, 2004 it has been inter alia provided that if ad interim order as sought is granted it would affect subsequent project of the respondents under execution. It has been further provided that the project pertained to a contract dated 12th August, 2004 entered into between the respondent and the applciant for redevelopment by converting the site from the existing bulk terminal into a container terminal. By the said order it has been further stated that even inorder to facilitate the petitioner in establishment its case before the appropriate forum it is necessary to permit the petitioner to take inspection and maintain a record of the material he claims to be entitled to under the agreement. In the aforesaid circumstances, the ad interim relief was rejected and order dated 18th October, 2004 was vacated. The respondents and the applicants were directed to permit the petitioner to take inspection of the site on 5th November, 2004 between 11 a.m. and 4 p.m. and that the respondent shall issue necessary passes to any six

persons nominated by the petitioner in writing addressed to the respondent. However, by the said order dated 27th October, 2004, the motion is not disposed of and the same is pending. The said order therefore has to be treated as ad interim order. The said notice of motion by consent of the parties is also taken up for hearing alongwith the present Arbitration Petition.

6. Learned counsel for the respondents has contended that the original contract does not include the removal of the conveyor galleries being GR3, FR7, FR8 and FR9 passing above the storage sheds/silos. and therefore the petitioner has no right whatsoever to get the salvage material of the said galleries. It has been contended that the petitioner has already completed and carried out the work which was assigned to him under the said tender Both the learned counsel for the applicants as well as the respondents has very strenouusly urged that I should not pass any order in the present petition as also in the application for two reasons. Firstly it has been contended that there is no necessity to pass any further order in the

Arbitration Petition in view of the order dated 27th October, 2004 passed by the learned Single Judge in the said notice of motion. It has been further contended by both the learned counsel for the applicant and the respondents that any order passed by this court in this Arbitration Petition will have cascading effect on the project which has been undertaken by the applicant in respect of providing for the new terminal. It has been further contended that the project involves an huge amount of Rs.1000 crores and this court therefore should not pass any orders. It has been further stated that any order passed in the present petition would tantamount to interference with the said project and would consequently result in delay in implementation of the said project. Learned counsel for the applicant and the respondent stated that I must dismiss the Arbitration Petition without passing any further orders. It has been urged by both the learned counsel for the parties that by taking inspection the petitioners' rights are not protected and no further reliefs are necessary.

7. I have heard both the parties. I am of the view that though it is true that any order if passed as prayed for in the present petition which is injuncting the applicants from entering into transaction pursuant to the said contract already executed on 12th August, 2004 and that would affect the project of constructing a new terminal for the Jawaharlal Nehru Port Trust. At the same time, it is not permissible for me to not to protect the rights of the petitioner which are subject matter of a dispute when a new project is already commenced and the subject matter of arbitration is likely to be removed affecting the petitioner's right in pending proceedings. The provisions of section 9 requires me to protect the rights of the petitioner with as far as possibly by a limited inconvenience to the respondent and in my view balance of convenience between the parties would meet by passing the following order :

8. In the aforesaid circumstances, I pass the following order :

(i) Prothonotary and Senior Master, High

Court, Mumbai is directed to appoint any Engineer frokm her panel or from the panel of the Court Receiver and Commissioner;

(ii) that Court Commissioner is appointed as commissioner to visit the premises and take inspection and take measurement of the galleries which are subject matter of the dispute in the present arbitration petition. On such completion, of the inspection report, the respondents as well as the applicants will be entitled to demolish the said galleries in pursuance of their contract dated 12th August, 2004 However, the applicants shall give notice of 24 hours after carrying out the demolition of the aforesaid disputed galleries to the court Commissioner and in such an event who within 48 hours therefrom the Court Commissioner shall visit the site and carry out the inventory of the salvage material which will be available on the demolition of the said galleries. The court Commissioner shall file the salvage

report as well as inspection report in court. The aforesaid order will apply only in respect of the disputed portion of the structure which has been described in the petition.

(iii) In so far as the demolition is concerned, it has been informed by the learned counsel for the applicant that it is not possible to carry out the entire demolition at a time It has been the contention of the learned counsel for the applicant that the demolition will have to be carried out as per the agreement and as and when part of demolition is carried out a notice will be issued to the court Commissioner so directed in clause (i) above.

(iv) It goes without saying that for the purpose of implementation of the order, the respondents shall issue necessary pass and permit the Commissioner as well as the petitioner’s representatives within the

dock area as and when Commissioner so directs.

(v) In view of the aforesaid order, nothing survives in Notice of Motion No.3136 of 2004. The motion is disposed in terms aforesaid. Arbitration Petition No.387 of 2004 is also disposed of in the aforesaid terms. It is also clarified that till and until inspection is carried out, the applicants shall not demolish any of the disputed part of the gallery as set out in the present petition.

. Certified copy is expedited.

S.U.KAMDAR, J